Supreme Court, U.S.
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No. 02-1380

IN THE

Supreme Court of the United States

ROBERT C. FOSTER and ANN I. FOSTER,

Petitioners,

v.

MARITRANS, INC., MARITRANS, G.P., INC., and MARITRANS OPERATING PARTNERS, L.P.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

BRIEF IN OPPOSITION

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COUNTER-QUESTION PRESENTED FOR REVIEW

Whether there are compelling reasons, in accordance with Rule 10 of the Rules of the Supreme Court of the United States, to grant a petition for a writ of certiorari to review and consider the decision of the Pennsylvania Superior Court in granting the motion for judgment notwithstanding the verdict of the owner of a tugboat vessel, based on a plaintiff/seaman's failure to establish a cause of action for unseaworthiness, where the only relevant evidence of record was the presence of naturally formed ice on the deck of a vessel in transit.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Plaintiff, Robert C. Foster, petitioner herein and appellee in the state appellate court below, was employed as a seaman on the tugboat DIPLOMAT at all relevant times in this matter. Co-plaintiff, Ann I Foster, co-petitioner herein and co-appellee in the state appellate court below, is the wife of Robert Foster.

Defendant, Maritrans Operating Partners, L.P., respondent herein and appellant in the state appellate court below, was the owner and operator of the tugboat DIPLOMAT. This entity was converted to corporate form as Maritrans Transportation Inc. Maritrans G.P. Inc., co-respondent herein and co-appellant in the state appellate court below, is no longer an operating entity. Maritrans, Inc., co-respondent herein and co-appellant in the state appellate court below, is a publicly traded company and is the parent holding corporation of Maritrans Transportation Inc. There is no parent or publicly held company owning 10% or more of this corporation's stock. The tug DIPLOMAT is no longer owned by any Maritrans entity. All the respondents are hereinafter referred to as "Maritrans".

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COUNTER-STATEMENT OF THE CASE

At all relevant times hereto, Maritrans was the owner and operator of the tugboat vessel DIPLOMAT. The tugboat was designed to tow barges which carry crude oil and petroleum derived products through navigable waters. The DIPLOMAT and its equipment were seaworthy in all respects and were safely operated.

Plaintiff was an assistant engineer on the DIPLOMAT, during all relevant times at issue. He was an experienced seaman, having sailed on various tugboat and other vessels for approximately twenty-seven years. (N.T. April 24, 2000: 134).

Sometime during his 12:00 noon to 6:00 p.m. watch, in February 29, 1996, as the DIPLOMAT made its way up the Delaware River, plaintiff walked out of the midship's house of the tug, out onto its afterdeck. He walked across the deck, including over the area in which he ultimately slipped and fell, to the vessel's Texas bar[1]. Plaintiff proceeded to measure the bar in accordance with normal tugboat practice. (N.T. April 24, 2000: 150; N.T. April 27, 2000: 66). Plaintiff then returned to the midships' house, walking back over the same deck. (N.T. April 24, 2000: 154). Plaintiff confirmed that, during this time, he observed no ice on the deck of the vessel and had no problems walking over the deck, including over the area of the deck in which he subsequently had his accident. The deck was free of ice in these hours before the accident. (N.T. April 24,

1. The Texas bar, a part of the vessel's towing equipment, extended from one side of the vessel to the other, at the stern, or rear section of the tug. It was used to ensure that the tug's towing cable, which extended over the stern of the tug, remained above the deck to prevent the cable from fraying. (N.T. April 24, 2000: 147-148; N.T. April 27, 2000: 65-67).

2000: 154-155, 170-171). There is no record of any work being done on the vessel in this stern area of the tug and, in fact, no record of anyone being in this area or walking on the deck after plaintiff checked the Texas bar. (N.T. April 24, 2000: 156-157).

At approximately 6:20 p.m. on February 29, 1996, plaintiff stepped out onto the deck of the vessel. The DIPLOMAT had continued its trip up the Delaware River during the afternoon of February 29, thus experiencing ambient water on deck. Plaintiff was the first tug crewman to go out onto the deck prior to his checking the Texas bar several hours before. (N.T. April 24, 2000: 156). As an experienced seaman, he was quite aware of vessel seagoing conditions in winter and he especially knew that water from the river, sprayed onto metal deck surfaces, could result in the formation of ice. (N.T. April 24, 2000: 134-138). As plaintiff stepped onto the deck, he alleges that he slipped on a thin layer of ice. (N.T. April 24, 2000: 53-54).

If plaintiff did slip on ice on the deck, the ice formed sometime after plaintiff checked the Texas bar. It formed contemporaneously and uniformly on the deck and on metal surfaces due to underway or transit conditions of the vessel, i.e. water being washed on deck from the river and freezing. (N.T. April 24, 2000: 52; N.T. Skye Dep: 64-65, 83-84). These conditions were not present when plaintiff assisted in the towing operations and checked the Texas bar.

At the trial in this matter, plaintiff offered evidence, by his own testimony and that of his liability expert, William Skye, that the ice on which he slipped was formed on the deck due to ambient conditions, i.e. water from the river spray freezing on the metal surfaces of the deck as the tug transited the river. (N.T. April 24, 2000: 54, 138-140, 147-156; N.T. Skye Dep: 64-65, 83-84). This testimony represented the only evidence

plaintiff submitted to the jury at trial relative to the manner in which ice formed on the tug and was the only evidence on his allegation of the vessel's unseaworthiness.

Throughout the trial, Maritrans preserved its right to move for a judgment notwithstanding the verdict and, following the jury verdict, timely moved for judgment notwithstanding the verdict in its post-trial motion. The motion was based, in relevant part, on the grounds that the only evidence plaintiff presented at trial on the issue of the unseaworthiness of the tug DIPLOMAT was that ice formed on the deck due to the naturally occurring ambient, wintry conditions the tug encountered while underway. This was insufficient to prove a cause of action for vessel unseaworthiness, since the mere presence of ice on the deck of a vessel in transit, under established, well-recognized maritime law, does not constitute an unseaworthy condition. The evidence plaintiff presented at trial on the manner of treating ice on a deck was related to issues of conduct and thus negligence. Since the jury, at trial, had returned a verdict in favor of Maritrans on the issue of negligence and plaintiff had failed to establish a cause of action for unseaworthiness, judgment on behalf of Maritrans was warranted.

Following the trial court's denial of the motion for judgment n.o.v., Maritrans filed a timely appeal to the Pennsylvania Superior Court, averring, among other things, that its motion for judgment n.o.v. should have been granted, based on plaintiff's failure to make out a case of unseaworthiness. The Superior Court, by its Opinion of January 9, 2002 (Appendix A attached to plaintiff's petition), reversed the denial of the motion and directed that judgment n.o.v. be granted on behalf of Maritrans. The court, relying on and consistently applying the established maritime law

which directly addressed the issue, held that plaintiff failed to prove that the mere presence of ice on the tug's deck rendered it unseaworthy, confirming that such a condition is reasonably expectable and unavoidable in the shipboard experience and, unless working surfaces are proven to be unreasonably slippery, a vessel owner is not liable for unseaworthiness.

The Pennsylvania Supreme Court, in accordance with guidelines suggested by Rule 1114 of the Pennsylvania Rules of Appellate Procedure, guidelines which are consistent with the rules this Court considers in reviewing a petition for writ of certiorari, deemed it inappropriate or unnecessary to consider the issue; and, by Order of November 20, 2002 (Appendix B attached to plaintiff's petition) denied Plaintiff's Petition for Allowance of Appeal, thereby leaving in place the ruling of the Superior Court.

REASONS FOR DENYING THE PETITION

Rule 10 of the United States Supreme Court Rules states, in pertinent part, that:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicates the character of the reasons the Court considers:
>
> * * *
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

> (c) a state court or a United States court of appeals has decided on important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

* * * *

None of the criteria so indicated nor any other constitute a compelling reason justifying granting of plaintiff's petition for writ of certiorari. The Pennsylvania Superior Court acted properly and in accordance with recognized, well-accepted maritime law in granting judgment n.o.v. to Maritrans, where the evidence plaintiff presented to the jury to establish unseaworthiness of the Maritrans' tug consisted solely of his and his expert's testimony that contemporaneous, naturally occurring ice formed on the deck of the tug, while the vessel was in transit. The presence of ice on the deck of a vessel in transit, a condition resulting from unavoidable exposure to weather and ambient conditions, does not render the vessel unseaworthy, as a matter of maritime law.

The ruling of the Pennsylvania Superior Court does not involve an important federal question which in any way conflicts with the decision of another state court or a United States court of appeals or this Court. On the contrary, the ruling confirms the well settled existing law of unseaworthiness as it relates to ice on the deck of a vessel in transit and hence does not warrant consideration by this Court.

(1) The Question Decided By The Appellate Court Does Not Constitute An Important Federal Question Which Conflicts With The Applicable Decisions Of State Courts Of Last Resort or United States Courts Of Appeal

Plaintiff, petitioner herein, slipped on ice on the deck of the DIPLOMAT, a tugboat owned and operated by Maritrans. Plaintiff alleged that the tug was unseaworthy as a result of this ice, yet the only evidence offered at trial on this issue, provided in the testimony of plaintiff himself and his liability expert, was that there was a natural accumulation of ice formed as a result of water spray being washed onto the deck of the tug while the vessel was in transit in the Delaware River. Based on this evidence and this evidence alone, plaintiff alleged that the vessel was unseaworthy. There was no other evidence presented to the jury or argued by plaintiff on the question of the vessel's unseaworthiness.

While the question of whether or not judgment n.o.v. is an appropriate remedy in a case involving the slip and fall of a seaman on naturally formed ice on the deck of a vessel in transit is important vis-a-vis a seaman's ability to sue a vessel owner employer, it does not present a significantly important federal question which warrants consideration by this Court. Moreover and most significantly, the question is well-settled and the applicable maritime law is universally accepted. The Pennsylvania Superior Court properly applied this law in a manner which does not conflict and, in fact, is fully consistent with the decisions of state and federal courts which have considered the question.

It is beyond dispute that a judgment notwithstanding the verdict is properly granted when there is insufficient competent evidence to sustain a jury verdict, giving the verdict winner the benefit of every inference which reasonably may be drawn from the evidence. *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1166 (3d Cir. 1993); *Wenrick v. Schloemann-Siegmag Aktiengesellschaft, et al.*, 523 Pa. 1, 4, 564 A.2d 1244 (1989). Given the evidentiary trial record in this case relating to the manner of accumulation and presence of ice on deck, the Pennsylvania Superior Court was correct, based on established, uniform maritime law and the standards for granting judgment n.o.v., in concluding that there was insufficient competent evidence to sustain a verdict of unseaworthiness. Its ruling was fully consistent and in keeping with the rulings of state and federal courts which have addressed this issue and applied maritime law.

The doctrine of unseaworthiness requires a vessel to be reasonably fit for its intended purpose, use, or service. It is not required to be "accident-free". *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539 (1960); *Unser v. Luckenbach Overseas Corp.*, 400 U.S. 494 (1971); *Pappas v. Potomac Party Cruises, Inc.*, 2000 U.S. App. Lexis 12443 (4th Cir. 2000) (citing *Mitchell v. Trawler Racer*). The standard is not strict liability or absolute perfection, but reasonable fitness for service. *Mahnich v. Southern S.S. Co.*, 321 U.S. 96 (1944). The mere fact that an injury occurs does not establish that a vessel is unseaworthy. *Mosley v. Cia. Mar. Adra, S.A.*, 314 F.2d 223 (2d Cir.), *cert. denied*, 375 U.S. 635 (1963).

With regard to the condition of decks, it is universally accepted that only an *unreasonably* slippery deck amounts to an unseaworthy condition and, significantly, the mere presence of ice, rain, or water on deck does not, in and of

itself, constitute a unseaworthy condition. *Yehia v. Rouge Steel Corp.*, 898 F.2d 1178 (6th Cir. 1990), *Denaro v. United States*, 337 F.2d 275 (2d Cir. 1964); *Lieberman v. Matson Navigation Co.*, 300 F.2d 661 (9th Cir. 1962); *Santamaria v. The SS OTHEM*, 272 F.2d 280 (2d Cir. 1959); *Stokes v. Janoush Towing, Inc.*, 685 F. Supp. 198 (E.D. Ark. 1988); *Zielinski v. Companhia DeNavegacao Maritima Netumar*, 460 F. Supp. 1179 (S.D.N.Y. 1978); *Turner v. The Cabins Tanker, Inc.*, 327 F. Supp. 515 (D. Del. 1971); *Tate v. A/B Svenska Amerika Linein*, 331 F. Supp. 854 (E.D. La.), *aff'd*, 435 F.2d 172 (5th Cir. 1970); *Shannon v. S.S. ULNA*, 285 F. Supp. 16 (E.D. La. 1968); *Connorton v. Harbor Towing Corp.*, 237 F. Supp. 63 (D. Md. 1964), *aff'd*, 352 F.2d 517 (4th Cir. 1965); *Colon v. Trinidad Corp.*, 188 F. Supp. 97 (S.D.N.Y. 1960); *Garrison v. United States*, 121 F. Supp. 617 (N.D. Cal. 1954). A seaman is not entitled to a deck that is free from all potentially slippery conditions; he is only entitled to a deck which is reasonably fit for its intended use. *Rice v. Atlantic Gulf & Pacific Co.*, 484 F.2d 1318 (2d Cir. 1973).

Thus it is undisputed, under the maritime law, initially established by this Court and then followed and applied by all courts which have addressed the issue, that the mere presence of naturally occurring ice does not automatically render a vessel unseaworthy. The state appellate court herein reviewed the entire evidentiary trial record and found that there was no evidence of unseaworthiness, only of naturally occurring ice on deck of a vessel in transit. Its decision to grant Maritrans' motion for judgment notwithstanding the verdict was in full accord and was consistent with the decisions of courts who have addressed the issue and applied the relevant, substantive maritime law. There exists no decision from any court which conflicts with the decision of the appellate court below.

Moreover, the Pennsylvania Superior Court acted appropriately and within the bounds of accepted and usual judicial proceedings in offering its decision. For instance, contrary to plaintiff's assertion that the question of unseaworthiness is one reserved exclusively for the jury[2], whether there is evidence sufficient to allow the question of unseaworthiness to be submitted to a jury is clearly a subject for motions for summary judgment, directed verdicts, and judgments n.o.v. and, as with other legal causes of action, courts will grant such motions when the facts do not sustain a claim of unseaworthiness. *Unser v. Luckenbach Overseas Corp.*; *Hernandez v. Trawler Miss Vertie Mae, Inc.*, 187 F.3d 432 (4th Cir. 1999); *Szymanski v. Columbia Transportation Co.*, 154 F.3d 591 (6th Cir. 1998); *Hurst v. Triad Shipping Co.*, 554 F.2d 1237 (3d Cir. 1977); *Zielinski v. Companhia Denavegacao Maritima Netumar*; *Turner v. The Cabins Tanker, Inc.*; *Canty v. Sun Transport, Inc.*, 422 Pa. Super. 607, 620 A.2d 1 (1992).[3] The appellate court in the subject

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2. Plaintiff's position that the question of unseaworthiness is one exclusively for a jury is fundamentally in error. Absent a claim of negligence under the Jones Act, 46 U.S.C. § 688, *et seq.*, the issue of unseaworthiness is not presented to a jury, but is heard directly by the trial judge. *Durden v. Exxon Corp.*, 803 F.2d 845, 848-49 (5th Cir. 1986); *Mahramas v. American Export Isbrandtsen Lines, Inc.*, 475 F.2d 165, 172-73 (2d Cir. 1973). As there is no Jones Act negligence count pending in the subject matter, the jury having specifically found that Maritrans was not negligent, a trial judge, not a jury, would be required to hear and determine the sole remaining issue of unseaworthiness.

3. The cases plaintiff cites for the proposition that summary judgment should not be granted in unseaworthy cases truly involve disputed questions of fact, i.e. whether or not certain working conditions or equipment on vessels represent unseaworthiness. (Cont'd)

appeal acted within accepted and sanctioned authority and in keeping with the requisite standard in granting judgment n.o.v., given the lack of evidence of unseaworthiness.

The appellate court also did not act improperly in applying federal maritime precedent fashioned by trial and appellate judges, as contended by plaintiff. Admiralty law is, in fact, primarily judge-made law. *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 259 (1976); *Fitzgerald v. United States Lines Co.*, 374 U.S. 16, 20 (1963); *The Tungus v. Skovgaard*, 358 U.S. 588, 611 (1959); *Gaudet v. Sea-Land Services, Inc.*, 463 F.2d 1331, 1332 (5th Cir. 1972). "No area of federal law is judge-made at its source to such an extent as is the law of admiralty." *Mitchell v. Trawler Racer, Inc.*, 362 U.S. at 550. The judiciary has, as a practical matter, led in formulating the remedies of the maritime law. *United States v. Reliable Transfer Co.*, 421 U.S. 397, 409 (1975).

(Cont'd)

See, for example, *Waldron v. Moore-McCormack Lines*, 386 U.S. 724 (1967) (adequacy of personnel to do a job); *Cook v. American S.S. Co.*, 53 F.3d 733 (6th Cir. 1995) (a parted support line); *Siderewicz v. Enso-Gutziet O/Y*, 453 F.2d 1094 (2d Cir.), *cert. denied*, 407 U.S. 912 (1972) (improper method and equipment for loading cargo); *Neidlinger v. Victory Carriers, Inc.*, 365 F. Supp. 1376 (E.D. Pa. 1973) (structure on floor presented an obstacle); *McLaughlin v. Eastern Engineering Co.*, 218 F. Supp. 380 (E.D. Pa. 1963) (adequacy of personnel to do a job); and *McLeod v. Union Barge Lines, Inc.*, 95 F. Supp. 366 (W.D. Pa.), *aff'd*, 189 F.2d 610 (3d Cir. 1951) (injury sustained by maid moving furniture). These cases, which were also cited by plaintiff to the Pennsylvania Superior Court and the Pennsylvania Supreme Court, are irrelevant to the situation presented herein, in which ice formed contemporaneously on the deck of a vessel in transit. Moreover, the courts in these cases were concerned with disputed issues of fact. There are no disputed facts relating to unseaworthiness in the subject matter.

The admiralty law relating to what constitutes unseaworthiness when ice naturally accumulates on a vessel in transit, which is the situation in the present matter, has been discussed, addressed and defined by the various judges who have considered this issue through the years. Their decisions constitute the substantive body of general maritime law which is directly applicable. In fact, it is this and the other judge-made general maritime law on which a jury, as the fact-finder in an admiralty case, is or should be charged at trial. Plaintiff's contention that the long developing and established admiralty law should be ignored because it is judge-made law is antithetical.[4]

The Pennsylvania Superior Court addressed and disposed of the question of unseaworthiness as it relates to ice on the deck of a vessel in transit, in accordance with the recognized substantive maritime law which has been developed and established over the years. The subject ruling in no way conflicts with decisions of the state and federal courts and, to the contrary, is absolutely consistent with these decisions. Since no conflict exits, such does not constitute a compelling reason for the granting of a petition for writ of certiorari.

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4. It is most significant that all the cases cited by plaintiff which discuss unseaworthiness, including those from this Court and the federal appellate courts and state courts, represent judge-made admiralty law.

(2) The Question Decided By The Appellate Court Does Not Constitute An Important Question Of Federal Law That Has Not Been Settled By This Court Nor Has It Decided An Important Federal Question In A Way That Conflicts With Relevant Decisions Of This Court

The question of what constitutes an unseaworthy condition is a significant issue in the maritime law; an issue which has been addressed by this Court on many occasions. See, for example: *Unser v. Luckenback Overseas Corp.*; *Waldron v. Moore-McCormack Lines*; *Mitchell v. Trawler Racer, Inc.*; *Mahnich v. Southern S.S. Co.*; *Michalic v. Cleveland Tankers, Inc.*, 364 U.S. 325 (1960). As previously discussed, from this established precedent, numerous courts have fashioned and confirmed the well-accepted principle that the mere presence of ice, rain, or other naturally occurring moisture on the deck of a vessel in transit does not, in and of itself, constitute an unseaworthy condition. Only an unreasonably slippery deck may be considered to represent unseaworthiness. This is a settled question which is consistent with the law of unseaworthiness as established by this Court and which does not warrant a revisiting of the issue by this Court. It is not a question of federal law which provides a compelling reason for the granting of a petition for writ of certiorari.

(3) There Are No Other Compelling Reasons Justifying The Granting Of A Petition For A Writ Of Certiorari

In his petition, plaintiff makes reference to other trial evidence of alleged culpable conduct and seeks to relate this evidence to the issue of unseaworthiness. For instance, plaintiff contends that the failure of the Maritrans' crew to

apply ice melt or take other actions to deal with the ice on deck somehow constitutes unseaworthiness. Plaintiff generally asserts that Maritrans' conduct resulted in an unsafe condition. However, a vessel owner's conduct is not relevant to the issue of unseaworthiness.

Admiralty courts have always made a clear distinction between vessel owner negligence under the Jones Act and the doctrine of unseaworthiness. Jones Act negligence is akin to principles of negligence law, in that the vessel owner has a duty to the seaman to exercise reasonable care on the vessel and is liable for its breach of this duty to do so. *Ceja v. Mike Hooks, Inc.*, 690 F.2d 1119 (5th Cir. 1982). The doctrine of unseaworthiness specifically does not depend on the exercise of reasonable care or negligence. *Mitchell v. Trawler Racer*, 362 U.S. at 550. In other words, Jones Act negligence measures the reasonableness of conduct, while unseaworthiness is concerned not with the conduct of the vessel owner, but with the condition of the vessel. *Unser v. Luckenbach Overseas Corp.*, 400 U.S. at 498.

The jury at the trial in this matter specifically found that Maritrans was not liable for negligence under the Jones Act; that is, nothing Maritrans did or did not do, no conduct of Maritrans or its crew, was unreasonable or negligent. The issue of Maritrans' conduct was never appealed and so was not before the appellate court and it is not before this Court. The only question of liability at trial and in the appeal below was whether the Maritrans' tug, DIPLOMAT, was seaworthy, i.e. reasonably fit for its intended use. And the only evidence of unseaworthiness raised and argued by plaintiff at trial[5] and presented for

5. It is undisputed that plaintiff's claim for unseaworthiness was based solely on ice on deck. For instance, plaintiff's liability expert (Cont'd)

consideration to the jury[6] was whether ice on deck created an unseaworthy condition.

Thus, plaintiff's argument concerning the conduct of Maritrans has no validity. However, and most significantly for purposes herein, it fails to suggest a compelling reason for the granting of a petition for writ of certiorari.

The other arguments plaintiff offers are similarly without basis and do not involve compelling reasons for further appeal. As already discussed, the established maritime law is that the mere presence of naturally occurring ice on the deck of a vessel in transit does not render a vessel unseaworthy. Since no evidence of unseaworthiness was offered at trial, plaintiff can not sustain his burden of proof on this cause of action, even if that burden is "slight", as he contends.

Maritrans acknowledges that there are factual circumstances in which the presence of ice on a vessel will create an unseaworthy condition. And plaintiff has offered

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(Cont'd)

testified about ice on deck as being the cause of the DIPLOMAT'S unseaworthiness. (N.T. Skye Dep: 64-65, 83-84). He described nothing else relative to this issue. Plaintiff's counsel, during his closing in which he summed up the evidence, made reference *only* to ice on deck as the unseaworthy condition at issue: "An icy deck, plaintiffs contend, is an unseaworthy condition . . ." (N.T. May 1, 2000: 173).

6. The trial court instructed the jury that "the question that you will have to decide is whether there was an icy deck and whether that made the ship unseaworthy." (N.T. May 1, 2000: 131). There was no instruction on any other alleged unseaworthy condition because there was no evidence of anything else.

some of these cases in his petition. Yet in none of these matters were the courts faced with the natural accumulation of ice on a vessel in transit and no other evidence.[7]

Finally, plaintiff seeks to persuade this Court by exaggerating the dangers which ice on the deck of an underway vessel presents to a seamen. In actuality, seamen, especially those with ten, twenty or more years of experience like this plaintiff, routinely perform their tasks in difficult ambient conditions. It is and for centuries has been, an inherent part of their job. As the court in *Colon v. Trinidad Corp.*, 188 F. Supp. 97, 100 (S.D.N.Y. 1960), cited by the Pennsylvania Superior Court herein (Appendix A, p. 6), confirmed:

> It seems only fair that men who make their livelihood on the water can be expected to cope with some of the hazardous conditions that must prevail even on a seaworthy vessel. Any stricter rule would require the intervention of traveling companions to guide and protect sailors in going about the vessel to perform their duties.

However, although a "seaman is not absolutely entitled to a deck that is not slippery", the courts have provided him with a measure of protection, in that he "is absolutely entitled to a deck that is not unreasonably slippery." Thus, contrary

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7. *Kline v. Maritrans, Inc.*, 791 F. Supp. 455 (D. Del. 1992) (many evidentiary factors raised unseaworthiness issues: e.g. drowned seaman who fell overboard had gone to urinate over the side of the vessel where seamen on the boat typically went, no handrail where one was called for, pants of decedent unzippered); *Oxley v. City of New York*, 932 F.2d 22 (2d Cir. 1991) (inadequate, underdeck heating system, absence of ladder).

to plaintiff's arguments, a seamen is not deprived of the remedy of unseaworthiness if he can offer evidence, not just that natural ice merely formed on the deck of a vessel in transit, but that the conditions created an unreasonably slippery situation.

On the other hand, the plaintiff's argument which is, effectively, that the very presence of ice on a vessel makes that vessel unseaworthy, would turn the maritime industry on its ear. Such a conclusion would render every vessel operating in temperatures below freezing and on which some ice happens to form, automatically unseaworthy and unfit. This is certainly not the intention of the doctrine of unseaworthiness or of the courts which have interpreted this doctrine.

Plaintiff's arguments, all initially submitted during the appeal process, were appropriately addressed by Maritrans and presumably considered by the Pennsylvania Superior Court and the Pennsylvania Supreme Court. That these arguments were and are not substantively valid and the issues were correctly decided by the appellate courts are significant. However, for purposes of the issues currently before this Court, the lower court rulings are not as compelling as the fact that they do not represent compelling reasons which warrant a further appeal of this litigation.

CONCLUSION

For all the foregoing reasons, the Maritrans' respondents respectfully request that plaintiffs' petition for writ of certiorari be denied.

Respectfully submitted,

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